IN THE HIGH COURT OF DELHI AT NEW DELHI

C.R.P. No.365/2006

TRISTAR CONSULTANTS ..... Petitioner
! through: Mr.M.S.Ganesh, Sr. Adv. with
Ms.Sushila Ram, Mr.K.Seshachary,
Ms.Neelam S.Kujur, Advs.

VERSUS

$ M/s.VCUSTOMER SERVICES INDIA PVT. LTD. & ANR.
.....Respondent
^ through: Mr.Vikas Dhawan, Adv.

RESERVED ON : 27-02-2007

% **D**ATE OF DECISION: 05-03-2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: PRADEEP NANDRAJOG, J.

1. A short question arises for consideration in the present revision petition.

2. The question is, under what circumstances and on what pleadings, a director of a company can be made liable in an

action for recovery of damages alleging breach of contract by the company.

3. Petitioner filed a suit stating that Dinesh Mirchandani was carrying on business as the sole proprietor of the plaintiff. It was stated that the plaintiff is carrying on business of providing human resources facilitation by locating right candidates suitable for top level managerial positions. It was stated that defendant No.1, represented through as also acting through Sanjay Kumar, its director, (Defendant No.2) held personal meetings as also exchanged proposals through e-mails. It was stated that defendant No.2 negotiated and concluded a written contract. As per the said contract, plaintiff was to identify and recommend to defendant No.1, after interviewing, suitable candidates. Plaintiff did so but defendants cancelled the contract. It was stated that post cancellation of the contract, correspondence was exchanged between the parties to recompense an agreed sum to the plaintiff. This correspondence was exchanged between the plaintiff and Sanjay Kumar, the director of defendant No.1. It was further stated that on behalf of defendant No.1, Sanjay Kumar agreed to pay professional fee of Rs.15 lacs, expenses incurred by the petitioner in sum of Rs.1.1 lacs, besides paying service tax. Alleging that the said agreement was not honoured, suit was filed

seeking recovery of Rs.11.61 lacs stated to be due and payable under invoices raised. Damages on account of breach of contract in sum of Rs.6 lacs was claimed.

4. Total suit amount is Rs.17.61 lacs.

5. Sanjay Kumar filed an application under Order 7 Rule 11 praying that qua him, plaint be rejected.

6. The learned Trial Judge, after hearing arguments, vide order dated 16.11.2006 as struck off the name of Sanjay Kumar from the array of defendants. The effect thereof is that the suit survives only against defendant No.1.

7. At the outset I may note that it is doubtful whether a sole proprietory firm is entitled to maintain an action. A sole proprietory firm is not a juristic entity. Correct description of the plaintiff ought to have been Dinesh Mirchandani carrying on business as sole proprietor of Tristar Consultants.

8. Be that as it may, it would be open to the plaintiff to correctly describe who the plaintiff is.

9. Another fact may be recorded. Rejection of a plaint is a decree as per definition of a decree under section 2 sub-section 2 of the Code of Civil Procedure. But I am not relegating parties to the remedy of appeal for the reason notwithstanding the fact that the Court was considering an application under Order 7 Rule

11 of the Code of Civil Procedure filed by defendant No.2 i.e. Dinesh Kumar, the Court has struck off his name from the array of defendants.

10. Learned counsel for the parties treated the order being under Order 1 Rule 10(2) of the Code of Civil Procedure i.e. addition and deletion of parties in a suit.

11. Order 1 Rule 3 of the Code of Civil Procedure requires that where right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist against various persons whether jointly, severally or in the alternative and if separate suits were brought against such persons, common questions of law or fact would arise, such persons may to be joint in one suit as defendants.

12. Sub rule 2 of Rule 10 of Order 1 permits a Court, at any stage of the proceedings, either upon or without any application of either party to strike out a person improperly joined as a defendant.

13. In a suit for recovery of money, only such persons can be impleaded as defendants against whom averments are made which on proof would entitle the plaintiff to a decree whether jointly or severally or in the alternative against the said persons named as defendants.

14. The other facet of the aforesaid proposition of law is that there must be a cause of action disclosed against a person impleaded as a defendant.

15. Learned counsel for the petitioner did not dispute that in the plaint there is no assertion against defendant No.2 that he personally undertook or agreed to clear any liability of the defendant outstanding against the plaintiff. No guarantee or indemnification has been pleaded.

16. But, submission of learned counsel for the petitioner is that every director acts as the agent of a company and therefore as an agent, a director would be personally liable if he has acted on behalf of the company.

17. Learned counsel for the petitioner has relied upon a decision of the Supreme Court reported as (1973) 1 SCR 985 *Ram Parshad vs. Commissioner of Income Tax.* Following passage has been relied upon:-

> "Through an agent as such is not a servant, a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant. It is again true that a director of a company is not a servant but an agent inasmuch as the company cannot act in its own person but has only to act through directors who qua the company have the relationship of an agent to its capacity. Managing Director may have a dual capacity."

18. I am afraid, learned counsel for the petitioner has got it

all wrong.

19. It is settled law that a company is a juristic person. Therefore, a company has to act through a living human being. Collectively, decisions on behalf of the company, are taken by the board of directors of a company. An individual director has no power to act on behalf of a company of which he is a director, unless there is a specific resolution of the board of directors of the company giving specific power to him/her, or, where the articles of company confer such an power.

20. Directors of companies have been described as agents, trustees or representatives of the company because of the fact vis-a-vis the company they act in a fiduciary capacity. They perform acts and duties for the benefit of the company. Thus, directors are agents of the company to the extent they have been authorized to perform certain acts on behalf of the company.

21. But directors of a company owe no fiduciary or contractual duties or any duty of care to third parties who deal with the company.

22. This distinction has been ignored by learned counsel for the petitioner.

23. Directors of a company are referred to as agents of the company in the context of their fiduciary duty to the company

and therefore if they derive any personal benefit while purporting to act on behalf of the company, they will be liable to the company and its shareholders. But the directors cannot be treated as acting as agents of the company, in the conventional sense of an agent, vis-a-vis third parties.

24. As conventionally understood, a person acts as an agent for a principal and represents the principal before third parties. Such contracts which are concluded by the agent on behalf of his principal with third parties would bind the principal to the third party.

25. Section 230 of the Indian Contract Act 1872 reads as under:-

> "**230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.-** In the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.
>
> **Presumption of contract to contrary.-** Such a contract shall be presumed to exist in the following cases:-
>
> (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;
>
> (2) where the agent does not disclose the name of his principal;
>
> (3) where the principal, though disclosed, cannot be sued."

26. A perusal of Section 230 of the Indian Contract Act 1872 shows that unless an agent personally binds himself, an agent is not personally liable for contracts entered into by him on behalf of his principal.

27. I may note an exception. The exception is that where an agent has contracted on behalf of a principal who is unnamed and undisclosed, on properly constituted pleadings and on so establishing, such an agent who acts on behalf of a undisclosed principal may be personally liable for a contract entered into by him.

28. To interpret the law as is sought to be projected by the petitioner would mean negation of the concept of a company being limited by its liability as per the memorandum and articles of association of the company. Other than where directors have made themselves personally liable i.e. by way of guarantee, indemnity etc. liabilities of directors of a company, under common law, are confined to cases of malfiescence and misfiescence i.e. where they have been guilty of tort towards those to whom they owe a duty of care i.e. discharge fiduciary obligations. Additionally, qua third parties, where directors have committed tort. To the third party, they may be personally liable.

29. For example by making false representations about a

company, a director induces a third party to advance a loan to the company. On proof of fraudulent misrepresentation, a director may be personally liable to the third party.

30. But this liability would not flow from a contract but would flow in an action at tort. The tort being of misrepresentation of inducement and causing injury to the third party having induced the third party to part with money.

31. Decision cited by learned counsel for the petitioner is clearly distinguishable. In the said decision, article 139 of the articles of association of the company in question enjoined that notwithstanding anything contained in the articles, the managing director is expressly allowed to work for and contract on behalf of the company as an agent of the company for which remuneration as agreed from time to time could be paid.

32. Under an agreement, in addition to monthly salary and other allowances, the appellant, Ram Parshad, was entitled to receive 10% of the gross profits of the company as commission.

33. Issue arose under the Income Tax Act as to how was the remuneration received to be taxed. In said context, the observations relied upon, and as noted in para 17 above have to be considered.

34. I therefore find no merit in the petition. The petition is

dismissed.

35. No costs.

March 05, 2007 **PRADEEP NANDRAJOG, J.**
dk